IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 13, 2007

# SHARON HUNT MATLOCK v. CLAUDE MARK MATLOCK

**Appeal from the Chancery Court for Humphreys County**
**No. CH-03-034 Leonard W. Martin, Chancellor**

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**No. M2004-01379-COA-R3-CV - Filed on May 16, 2007**

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In an action for divorce, Wife appeals the division of the marital debts and assets, the amount of her rehabilitative alimony award, and the court's decision to name Husband primary residential parent of the parties' two minor children. We affirm the judgment of the trial court on all issues except the classification and award of Husband's 401(k) retirement account.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Penny Harrington, Nashville, Tennessee, for the appellant, Sharon Hunt Matlock.

David D. Wolfe, Dickson, Tennessee, for the appellee, Mark Matlock.

## OPINION

This case concerns the termination of a twenty-seven year marriage. On September 30, 1977, Mr. Mark Matlock and Mrs. Sharon Matlock were married, shortly after completing their high school education. There were three children born to the marriage, however, only two of the children were in their minority at the time of divorce.

During the majority of the marriage, Mrs. Matlock maintained the household, including caring for the parties' three children as well as Mr. Matlock's elderly parents who lived on an adjoining property. In 2001, Mrs. Matlock became certified as a nursing technician and began working nights at Three Rivers Hospital from 7:00 p.m. until 7:00 a.m. on Sunday, Monday, and Tuesday, as well as Wednesday when available. Mrs. Matlock earned approximately $19,000.00 per year in her position, however, she was not entitled to benefits or retirement.

At the time of divorce, Mr. Matlock was employed as a boilermaker for the Tennessee Valley Authority (TVA), earning between $53,000.00 and $69,000.00 per year, depending on the amount of overtime he worked. His employer provided his health insurance. Mr. Matlock also maintained a part-time business doing carpet and floor work.

On February 26, 2003, Mrs. Matlock filed a complaint for divorce alleging inappropriate marital conduct. On March 13, 2003, Mr. Matlock answered and counter-claimed also alleging inappropriate marital conduct. At the time, both of the parties were forty-five years old.

Prior to trial, the court referred the case to the Special Master in order to valuate the marital estate. A trial took place on March 16, 2004, at which time the court awarded Mr. Matlock a divorce based on Mrs. Matlock's inappropriate marital conduct. The court also awarded custody of the minor children to Mr. Matlock and ordered that Mrs. Matlock pay child support in the amount of $450.00 per month.

Based on the Special Master's report, the court ordered that the marital home be sold and the marital debts be paid from the profits. Any remaining profit from the sale of the marital home was to be split equally between the parties. The court awarded Mrs. Matlock rehabilitative alimony in the amount of $1,500.00 per month for twelve (12) months, during which time she would earn her practical nurse license. The court equally divided Mr. Matlock's boilermaker annuity but awarded Mr. Matlock the entirety of his TVA 401(k).

Mrs. Matlock appeals arguing that the trial court erred in (1) ordering an equal division of the marital debt; (2) failing to award her sufficient rehabilitative alimony; (3) mischaracterizing Mr. Matlock's TVA 401(k) as separate property; and (4) naming Mr. Matlock primary residential parent.

Mrs. Matlock first contends that the trial court erred in the division of the marital debts. Both marital debt and marital property are to be equitably divided between the parties. *Cutsinger v. Cutsinger*, 917 S.W.2d 238, 243 (Tenn.Ct.App.1995). Marital debt is defined as "all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing." *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn.2003). Upon determining the extent of the marital debt, the trial court should consider the following factors in making an equitable distribution: (1) the party who incurred the debt; (2) the debt's purpose; (3) the party who benefitted from the debt; and (4) the party who is in the best position to repay the debt. *Alford*, 120 S.W.3d at 813.

In challenging the trial court's division of the marital debt, Mrs. Matlock argues that Mr. Matlock is in a better position to repay the debts because his annual income is significantly larger. However, the ability to repay is only one factor which the court must consider in making an equitable division of marital debt. The Special Clerk's report reveals that at the time of divorce, the parties' marital debt totaled $78,817.00. Both parties argue that the debt resulted from purchases made by and benefitting the other party. However, the court found both parties equally responsible for accumulating the debt and therefore equally liable for the debt. The record supports this finding and thus we find no error in the trial court's decision to divide the marital debt equally.

Mrs. Matlock next argues that the trial court failed to award her sufficient rehabilitative alimony. A trial court has wide discretion in the award of alimony, and therefore appellate courts are generally disinclined to alter a trial court's award. *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn.2002). In determining the propriety, nature, and amount of an alimony award, courts are to consider the statutory factors enumerated in Tenn. Code Ann. § 36-5-121(i):

> (i) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:
> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
> (3) The duration of the marriage;
> (4) The age and mental condition of each party;
> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
> (7) The separate assets of each party, both real and personal, tangible and intangible;
> (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
> (9) The standard of living of the parties established during the marriage;
> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
> (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

In applying the statutory factors, we cannot say that the evidence preponderates against the trial court's alimony award. Mrs. Matlock testified that she wanted to acquire additional education and obtain her practical nurse license in order to facilitate her rehabilitation. The total cost of the year long program is $3,000.00 and classes are scheduled Monday through Friday from 7:00 a.m. until 2:45 p.m. The additional education will raise Mrs. Matlock's hourly wage from approximately

$7.00 an hour to $17.00 an hour. And since the court named Mr. Matlock primary residential parent and Mrs. Matlock will be exercising visitation every other weekend, we can see no reason why Mrs. Matlock cannot continue working part-time as a nurse technician in order to supplement her income while she attends school. Although the parties were married for a significant amount of time, the record shows that Mrs. Matlock's mental and physical health are good and that she has many more productive working years ahead. The court also rewarded Mrs. Matlock for her contributions as homemaker by giving her half of all the marital assets. We believe that this award as well as the additional $1,500.00 rehabilitative alimony award will provide Mrs. Matlock a standard of living reasonably comparable to the standard of living enjoyed by the parties during the marriage.

Mrs. Matlock also challenges the trial court's decision to award Mr. Matlock the entirety of his TVA 401(k). In making such an award, the trial court stated, "The Court finds that the Husband's TVA 401(k) savings and deferral retirement plan was opened after the separation of the parties, as a result the Court finds that the Defendant/Husband should be awarded the monies therein." Tenn. Code Ann. § 36-4-121(b)(1)(A) defines marital property as:

> [A]ll real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage *up to the date of the final divorce hearing* and owned by either or both spouses as of the date of filing of a complaint for divorce, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date.

Tenn.Code Ann. § 36-4-121(b)(1)(A) (emphasis added). Because the 401(k) was created and funded prior to the final divorce hearing, the account clearly constituted marital property and was therefore subject to equitable division by the court.

Mr. Matlock however argues that the trial court did not mischaracterize the account as separate property but rather, intended to award him the entirety of that marital asset in equity since the account was created and funded by him after the parties separated. Based on the record, we disagree with Mr. Matlock's contention. Instead, we agree with Mrs. Matlock that the trial court erroneously classified the account as separate property and therefore failed to equitably divide the asset. Since "[a] spouse who is primarily a homemaker would be seriously disadvantaged by the inability to claim a portion of the retirement benefits that accrued during the course of the marriage," *Cohen v. Cohen*, 937 S.W.2d 823, 830 (Tenn.1996), we award Mrs. Matlock half of Mr. Matlock's TVA 401(k) valued at the time of divorce.

Mrs. Matlock finally asserts that the trial court erred in naming Mr. Matlock primary residential parent of the parties' two minor children because the court did not discuss all the factors provided in Tenn. Code Ann. § 36-6-106(a) when engaging in its comparative fitness analysis and because the court placed too much emphasis on the preference of the children. Tenn. Code Ann. § 36-6-106(a) provides:

> (a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. The court shall consider all relevant factors including the following where applicable:
> (1) The love, affection and emotional ties existing between the parents and child;
> (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that where there is a finding, under § 36-6-106(a)(8), of child abuse, as defined in §§ 39-15-401 or 39-15-402, or child sexual abuse, as defined in § 37- 1-602, by one (1) parent, and that a non-perpetrating parent has relocated in order to flee the perpetrating parent, that such relocation shall not weigh against an award of custody;
> (4) The stability of the family unit of the parents;
> (5) The mental and physical health of the parents;
> (6) The home, school and community record of the child;
> (7)(A) The reasonable preference of the child if twelve (12) years of age or older;
> (B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, as defined in §§ 39-15-401 or 39- 15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;
> (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and
> (10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

Tenn.Code Ann. § 36-6-106(a).

While it is helpful to a reviewing court if the trial court discusses each of the applicable statutory factors provided in Tenn. Code Ann. § 36-6-106(a) and how those factors impacted its custody determination, a trial court is not statutorily required to do so. *Harless v. Harless*, No. E2006-00192-COA-R3-CV, 2007 WL 906757, at *6 (Tenn.Ct.App. Mar. 26, 2007). In *Bell v. Bell*,

No. W2004-00131-COA-R3-CV, 2005 WL 415683, at *5 (Tenn.Ct.App. Feb. 22, 2005), the court explained:

> [T]he trial court was obligated to consider the applicable statutory factors in Section 36-6-106(a) in reaching its decision regarding the comparative fitness of the parties. *See Burnette v. Burnette,* E2002-01614-COA-R3-CV, 2003 WL 21782290, at *6 (Tenn.Ct.App. July 23, 2003). "However, the statute does not require a trial court, when issuing a memorandum opinion or final judgment, to list every applicable factor along with its conclusion as to how that particular factor impacted the overall custody determination." *Id.* Moreover, not every factor is applicable in a given case, and the trial judge is required to consider only the factors which are applicable. *Id.; see also Mueller v. Mueller,* W2004-00482-COA-R3-CV, 2004 WL 2609197, at *6 (Tenn.Ct.App. Nov. 17, 2004).

In this case, ample testimony regarding Mrs. Matlock's anger management issues and her tendency to resort to physical and verbal violence when angered, clearly supports the trial court's custody award. Mrs. Matlock admitted to engaging in physical and verbal violence against Mr. Matlock throughout the marriage and in the presence of the children. Mr. Matlock also testified to witnessing Mrs. Matlock punch one of the children in the stomach. The youngest child's softball coach testified about an incident where Mrs. Matlock backed his wife against a fence yelling at her because he decided not to play the child in a softball game. And while the transcript of the children's in chambers testimony is not in the record, the trial court clearly found that the children preferred to reside with their Father. We therefore affirm the trial court's decision to name Mr. Matlock primary residential parent.

In closing, the Court notes that Mrs. Matlock also claims that the trial court erred in failing to award her attorney's fees; however, she failed to properly address this issue in her brief. Tenn. R. App. P. 27(a) requires among other things, that an appellant provide in her brief an argument setting forth the contentions of the appellant with respect to the issues presented, the reasons why the contentions require appellate relief, and citations to the authorities and appropriate references to the record. Although an issue may have been designated in the notice of appeal, "a party's failure to brief it ordinarily constitutes waiver or abandonment of the issue." *Rector v. Halliburton*, No. M1999-02802-COA-R3-CV, 2003 WL 535924, at *9 (Tenn.Ct.App. Feb. 26, 2003).

The judgment of the trial court is affirmed in part, vacated in part, and remanded to the trial court for any further proceedings necessary. Costs of appeal are assessed equally between the parties.

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WILLIAM B. CAIN, JUDGE